IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 69

LEVIN NOCK DAVIS, ET AL.,
Appellants,

v.

HARRISON MANN, ET AL.,
Appellees.

MOTION AND APPLICATION TO VACATE STAY, FILED ON BEHALF OF APPELLEES GLANVILLE, SHEPHEARD, LIPKIN AND WILKINS.

HENRY E. HOWELL, JR.,
808 Maritime Tower,
Norfolk 10, Virginia,
Attorney for Appellees, Glanville, Shepheard, Lipkin and Wilkins.

SIDNEY H. KELSEY,
1408 Maritime Tower,
Norfolk 10, Virginia.

LEONARD B. SACHS,
520 Citizens Bank Building,
Norfolk, Virginia.
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 797

LEVIN NOCK DAVIS, ET AL.,

Appellants,

v.

HARRISON MANN, ET AL.,

Appellees.

MOTION AND APPLICATION TO VACATE STAY

Appellees, intervening petitioners below, Charles L. Glanville, William L. Shepheard, Paul M. Lipkin and Jack R. Wilkins, move and make application pursuant to Rule 35 of the Rules of the United States Supreme Court to vacate the stay granted by the Chief Justice of this Court of the relief awarded appellees by the judgment of the Three-Judge Court entered on November 28, 1962. [Appellants' Appendix 34]

Statement of Proceedings

Appellees herein and principal appellees are citizens and qualified voters of the State of Virginia, residing respectively in the City of Norfolk, Arlington County and Fairfax County.

A complaint and intervening petition were filed in the District Court for the Eastern District of Virginia at Alexandria, seeking to have a Three-Judge Court declare un-

constitutional the legislative apportionment statutes passed by the Virginia General Assembly in 1962 as violative of their rights guaranteed to them by the Fourteenth Amendment of the United States Constitution.

The cace was heard on October 22 and 23, 1962. At this trial the Office of the Attorney General failed to produce a single witness, legislator or otherwise, to certify as to the rationale of the apportionment statutes under attack.

On November 28, 1962, Circuit Judge Albert V. Bryan handed down the majority opinion [Appellants' Appendix 1] declaring the subject statutes unconstitutional, and entered a decree enjoining the holding of elections pursuant to the unconstitutional acts, by affording the General Assembly until January 31, 1963, to meet and effect a fair and equitable reapportionment act.

The court below stayed the enforcement of its injunction until January 31, 1963, but refused a stay beyond this period.

Appellants filed an application for a stay with the Chief Justice of this Court on December 10, 1962, and the Chief Justice granted a stay on December 13, 1962, without a hearing.

On February 6, 1963, appellants filed their statement of jurisdiction fully delineating their attack on the opinion below.

On February 11, 1963, appellees waived their respective rights to reply to the statement of jurisdiction and now file this motion and application to vacate the stay heretofore granted.

Reasons for Vacating Stay

A

Continuation of stay effects irreparable injury to Appellees

Pendency of a Christmas adjournment suggested the propriety of a stay in this case so as to allow appellants ample time to present their attack on the opinion below. This they have now had and it is submitted that appellants have failed to justify a continuance of a stay which, if continued, will substantially dilute, if not make academic, appellees' rights which the court below seeks to protect under the jurisdiction affirmed by the opinion of this Court in *Baker* v. *Carr*, 369 U. S. 186.

The lower court has found that the rights of three-quarters of a million people to fair apportionment of state representation have been violated.[1]

In July of this year a primary election will be held pursuant to what is now decreed to be an unconstitutional plan of apportionment. Success in this primary is tantamount to an election in over eighty per cent of the state and will determine representation in the State Senate until January, 1968.

The irreparable damage that continued delay in the enforcement of the lower court's decree imposes on the citizens of the communities represented by appellees is stated by Circuit Judge Bryan as follows [Appellants' Appendix 12]:

> "However, our preference has been, and still is, for the General Assembly of Virginia to square the injustices of the 1962 Acts. But the circumstances did

[1] Population of: City of Norfolk, 304,869; Fairfax 285,194; Arlington 163,401.

not permit deferment of the determination of this suit until the next regular session of the Legislature, which convenes in January 1964. To begin with, the Senators elected in 1963 would not take office until January 1964 and would serve until January 1968. Similarly, Delegates chosen in 1963 would enter in January 1964 and be in office until January 1966. The dispropionate representations could not be righted by the 1964 General Assembly prior to 1966 in the case of Delegates, and not until 1968 as to the Senators, for there would not be another House election before 1965 and none for the Senate prior to 1967. This delay would be unreasonable."

Time has been made the essence of justice in this case, in part by reason of appellants' delaying tactics.[2]

It is submitted that appellants have sought delay for the sake of delay in hopes that enforcement of appellees' rights may be nudged beyond the perimeter of practical realization.

B

Justification for a stay has not been presented

To justify a continuance of this stay, appellants have the burden of indicating good cause for a full review of the lower court's action by clearly pointing to error or the presence of issues, the resolution of which by this Court would establish national guide lines for the assistance of lower courts in determining similar cases.

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[2] The trial below was set for September 19, 1962, but was continued to October 22, 1962, on motion of the Attorney General of Virginia, to permit his office to interview certain unidentified potential witnesses. At the October trial no witness was produced to testify as to the rationale of the 1962 apportionment plan.

Neither is present here.

The lower court's opinion does not hold that a rational system of apportionment cannot accommodate a difference in population among districts.

The opinion below written by a Circuit Judge who is a native of Virginia, familiar with its physical characteristics and experienced in its governmental processes, holds only that where there is a four to one discrimination in district representation, the proponent of the discrimination must justify the condition with sound reason. [Appellants' Appendix 11, 12]

In other words, discrimination without reason is invidious.

Appellees submit that this conclusion is not debatable.

The decision of the court below likewise does not offer a medium for deciding the applicability of the Federal analogy to state legislative bodies as does the case of *Scholle* v. *Hare* (1962) 369 U. S. 429. The Virginia Senate and House are treated similarly by the Virginia Constitution.

Conclusion

It is submitted that the record and pleadings in this case have now for the first time matured to the point that it may be made clear to this Court that the stay originally granted has served its purpose and should be vacated.

However, if this Court deems it proper to further consider continuance of a stay, an indefinite stay should not be granted without hearing all the argument and information that either party can offer.[3]

Accordingly, it is respectfully submitted that the stay heretofore granted should be vacated.

Respectfully submitted,

CHARLES L. GLANVILLE,
WILLIAM L. SHEPHEARD,
PAUL M. LIPKIN AND
JACK R. WILKINS,

By HENRY E. HOWELL, JR.,
Of Counsel.

HENRY E. HOWELL, JR.,
for Howell, Annios & Daugherty,
808 Martime Tower,
Norfolk 10, Virginia.

SIDNEY H. KELSEY,
1408 Maritime Tower,
Norfolk 10, Virginia.

LEONARD B. SACHS,
520 Citizens Bank Building,
Norfolk, Virginia.

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[3] See dissent of Justice Jackson, *Land* v. *Dollar* (1951) 341 U.S. 737, 749.

Proof of Service

I, HENRY E. HOWELL, JR., one of the attorneys for the appellees Glanville, Shepheard, Lipkin and Wilkins herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 12th day of February, 1963, I served copies of the foregoing Motion on the several appellants and appellees (principal plaintiffs below) by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record as follows: The Honorable Robert Y. Button, Attorney General of Virginia, Supreme Court-State Library Building, Richmond 19, Virginia; David J. Mays, Esquire, State-Planters Bank Building, Richmond 19, Virginia; Edmund D. Campbell, Esquire, 822 Southern Building, Washington 5, D. C., and E. A. Prichard, Moore Building, Fairfax, Virginia.

HENRY E. HOWELL.

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